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Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

Matthew J. Shaub,
Petitioner,
v.
Commonwealth of Pennsylvania,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does 75 Pa.C.S. §3806(b) act as an *ex post facto* provision, when its ten year lookback provision is applied retroactively, especially as to the Petitioner, who has completed an Accelerated Rehabilitative Disposition ("ARD") program, in lieu of a conviction, under its predecessor statutes, who has kept the bargain of 75 Pa.C.S. §3731(e) (repealed), the prior seven year lookback rule, and who has been caught in the deeper dragnet of §3806(b), so as to be exposed to a considerably longer prison sentence under §3804(c) upon a second conviction for DUI?

II

Has the Commonwealth of Pennsylvania performed a substantive and procedural violation of Petitioner's rights under the XIV Amendment when it assessed him an enhanced sentence even though its own

statutes, § 21(2) and § 21(5) of Act 24 of 2003, 2003 Pa.Laws 120, forbad such an enhancement.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner's Petition for Allowance of Appeal was denied, per curiam, by the Pennsylvania Supreme Court on December 30, 2008, sub nom Commonwealth of Pennsylvania, v. Matthew John Shaub, 963 A. 2d 469 (Pa. 2008).

The decision of the Pennsylvania Superior Court is entered, without printed opinion, at 959 A.2d 973 (Pa. Super. 2008) and is included as Appendix "A".

The decision and order of the Court of Common Pleas of Lancaster County, Pennsylvania, Commonwealth of Pennsylvania v. Matthew J. Shaub, No. 5656 of 2006 is unreported and is included as Appendix "B".

JURISDICTION

Petitioner's Petition for Allowance of Appeal was denied, *per curiam*, by the Pennsylvania Supreme Court on December 30, 2008, *sub nom* Commonwealth of Pennsylvania, v. Matthew John Shaub, 963 A. 2d 469 (Pa. 2008).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution: Art. I, § 10, cl. 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but goild and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

United States Constitution: XIV Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty , or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. The Trial Court Proceedings

On November 1, 2007 the Honorable David J. Ashworth rendered the Court of Common Pleas of Lancaster County, Pennsylvania decision in the instant matter holding that the ten year "look back" provision of 75 Pa. C. S. A. § 3806(b) did not violate the constitutional and due process protections against ex post facto laws. Petitioner Shaub was arrested on April 14, 1998 for DUI. On August 25, 1998 he entered the Accelerated Rehabilitative Disposition Program ("ARD"), which he successfully completed on March 27, 2000. At the time of his completion of ARD, 75 Pa. C. S. A. § 3731(e) was the law of Pennsylvania. Under that statute a defendant who was arrested a second time within seven years for DUI was subject to an enhanced penalty, but was within a safe harbor after the

seventh year. On February 1, 2004 the DUI statute was changed by the aforesaid 75 Pa. C. S. A. § 3806(b) which increased the "look back" period to ten years. On August 29, 2006 Petitioner Shaub was again arrested for DUI, within the new ten year "look back" thus losing the protection of the seven year safe harbor. The Court based its opinion on Commonwealth v. McCoy, 895 A. 2d 18 (Pa Super. 2006), which held, 895 A. 2d at 34 that the statute merely enhanced McCoy's punishment for the second offense.

B. The Pennsylvania Superior Court Decision

Petitioner timely appealed the trial court's order, continuing to argue the constitutional issues of due process and *ex post facto* application of the sentence rendered. The Superior Court affirmed the Trial Court holding that Commonwealth v. McCoy, *supra*

disposed of Shaub's *ex post facto* argument and that Commonwealth v. Tustin, 888 A. 2d 843 (Pa. Super 2005),(citing therein at 846, this Court's opinion in Whitte v. United States, 515 U.S. 389, 400 (1995)), disposed of his due process argument.

C. The Pennsylvania Supreme Court Decision

Petitioner's Petition for Allowance of Appeal wasdenied, *per curiam*, by the Pennsylvania Supreme Court on December 30, 2008, *sub nom* Commonwealth of Pennsylvania, v. Matthew John Shaub, 963 A. 2d 469 (Pa. 2008).

REASONS FOR GRANTING THE PETITION

I

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle stop in Lititz, Lancaster County, PA on August 29, 2006 during which your Petitioner, Matthew J. Shaub (defendant and appellant below) was charged with a violation of Title 75 C.S.A.§3801 et seq, (DWI). He was determined to have a BAC of .21%, in violation of §3804(c) (Highest level of alcohol). On June 18, 2007, Shaub plead guilty as charged and a pre-sentence investigation was ordered . Shaub stood for sentencing before the Honorable David L. Ashworth on September 17, 2007. In a Sentencing Memorandum, Shaub challenged the legality of a sentence that would find him culpable as a second offender under §3806, but regardless, was

sentenced to 90 days in Lancaster County Prison, based on Shaub's prior DUI on April 14, 1998.

In that case, Shaub was allowed to enter the ARD program, which he completed in a timely manner on March 27, 2000. At the time, there was a seven (7) year "lookback" rule, which rule was expanded to ten (10) years by §3806. Thus, Shaub had completed his seven (7) year window under §3731(e), but he fell into the ten (10) year window of §3806. The basis of Shaub's appeal is that the ten (10) year window is being applied unconstitutionally and in derogation of the specific exclusion of Section 21(2) and 21(5) of Act 24 of 2003.[1] Because of his successful completion of ARD, Shaub did not suffer a conviction for the first offense. In September and October of 2007, various motions were filed on

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[1]Act of Sept. 30, 2003, P.L. 120 No.24, effective February 1, 2004 (P.L. 24), which repealed the former DUI Statute, 75 Pa. C.S.A. §3731.

Shaub's behalf as he continued to challenge the legality and constitutional nature of his sentence.

II

EX POST FACTO APPLICATION

Shaub maintains that his September 17, 2007 sentence is in violation of *ex post facto* jurisprudence, as stated in this Court's precedent.[2] The matter was appealed in timely fashion to the Superior Court, where argument was held, and from which an "Non-precedential Opinion" was issued on July 16, 2008, wherein Shaub's sentence was deemed to be constitutional. The Superior Court found, following Commonwealth v. Tustin, 2005 Pa.Super 386; 888 A.2d 843 (2005), that the 10 year

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[2] *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L. Ed. 648 (1798); *Fletcher v. Peck*, 6 Cranch 87, 138 (1810); *Cummings v. Missouri*, 4 Wall. 277, 325-326, (1867); *Gut v. State*, 9 Wall. 35, 38 (1870); *Beazell v. Ohio*, 269 U.S. 167 (1925); ; *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Collins v. Youngblood*, 497 U.S. 37, 41, 111 L.Ed. 2d 30 (1990).

lookback rule of 75 Pa.C.S. § 3806, was constitutional. In that case a sentence was contested as a Due Process violation by a defendant who was sentenced as a second offender. He, like Shaub, had been convicted under former 75 Pa.C.S. §3731. The court specifically did not address the *ex post facto* issue, indicating in fn. 2 that Tustin limited his appeal to the due process matter. Tustin, 888 A.2d at 844. Here, Shaub is specifically challenging the *ex post facto* application, and asserts that under our Constitution, and especially as addressed by the General Assembly in the Act of Sep 30, 2003, P.L. 120, No. 24, no retrospective or *ex post facto* application shall occur.

Section 21(2) states:

> The repeal of 18 Pa.C.S. § 7514 and 75 Pa.C.S. § 3731 shall not affect offenses committed prior to February 1, 2004, or civil and administrative penalties imposed as a result of those offenses.

Section 21(5)(i) states:

Except as set forth in subparagraph (ii) or (iii), this act shall not affect an offense committed before February 1, 2004, or any criminal, civil and administrative penalty assessed as a result of that offense

This issue is not addressed by the Tustin court in its opinion, which did not deal with the *ex post facto* objection.

The Superior Court, in its opinion below, also cites a number of other decisions upon which it relies: Commonwealth. v. McCoy, 895 A.2d 18 (Pa.Super. 2006); Commonwealth. v. Smith, 904 A.2d 30 (2006); and Commonwealth. v. Cook, 941 A.2d 7 (2007). However, the Superior Court did not address the Pennsylvania Supreme Court's opinion in Commonwealth. v. Estman, 915 A.2d 1191 (Pa. 2007), where the important difference between substantive and procedural statutes was resolved. Estman was raised before the Superior Court, but was ignored.

The Pennsylvania Supreme Court has never addressed the *ex post facto* application of §3806(b), as complained of by Shaub.

This petition follows, alleging that Shaub has been deprived of his rights under the U.S. Constitution Art. I, §10, Cl.1. In Smith v. Doe, 538 U.S.84, 155 L.Ed. 2d 164 (2003), reh. den. 538 U.S. 1009 (2003); L. Ed.2d 844 (2003), the United States Supreme Court differentiated between punitive statutes (subject to the *ex post facto* Clause) and "civil proceedings" which are not subject to constitutional prohibitions. Id. @ 538 U.S. 84, 92-97.

Shaub draws this Court's attention to the punitive nature of §3806(b). Under the prior act a Trial Court imposed a punishment, in Shaub's case, ARD plus a seven year period within which he must not again violate the DUI law. In essence he was on probation for seven years. Now the new act

increased that probation to ten years. This action clearly violates Justice Chase's first alternative Category 3 "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. 386 (1798) at 390-391. Indeed this Court's opinion in Stogner v. California, 539 U.S. 607 (2003) suggests that Justice Chase's first alternative Category 2 "Every law that aggravates a crime, or makes it greater than it was, when committed." Calder at 390-391, also applies to the instant case. If, however, this Court finds that the greater penalty is not punitive in nature, then it must of necessity be a "civil proceeding."

In the latter case, the instant application of the statute clearly violates the "civil and administrative penalty" provision of the statute. If §3806(b) is punitive, then it is in and of itself *ex post facto*.

II.

XIV AMENDMENT DUE PROCESS

Further, Shaub maintains that his sentence unconstitutionally deprives him of due process by ignoring §21 of the Act of 2004 wherein the DUI laws in Pennsylvania were re-written to comply with the federal mandate that .08% BAC would be the national limit for drivers, beyond which criminal penalties would attach.

Section 21(2) and Section 21(5)(I) are set out in full at page 10 *supra*. The matter was appealed in timely fashion to the Superior Court, where argument was held, and from which an "Non-precedential Opinion" was issued on July 16, 2008, wherein the act was held to be ineffective in Shaub's case, and his sentence was deemed to be constitutional. The Superior Court found that Tustin governed,

that the 10 year lookback rule of 75 Pa.C.S. § 3806 was not a due process violation, and that the sentence was constitutional. In its opinion the Tustin Court cites this Court's opinion in Witte v. United States, 515 U.S. 389, 400 (1995). The Superior Court's reliance on that case is misplaced. Witte is inapposite to the issue of due process as applied to Shaub as it interprets the Federal Sentencing Guidelines under the double jeopardy clause. Here, on the other hand, Shaub has a due process right to require the Commonwealth of Pennsylvania to "play by its own rules", Carmell v. Texas, 529 U.S. 513, 533 (2000).

The Superior Court, in its opinion below, also cites a number of other decisions upon which it relies: Commonwealth. v. McCoy, 895 A.2d 18 (Pa.Super. 2006); Commonwealth. v. Smith, 904 A.2d 30 (2006); and Commonwealth. v. Cook, 941 A.2d 7 (2007).

However, the Superior Court did not address the Pennsylvania Supreme Court's Commonwealth. v. Estman, 915 A.2d 1191 (Pa. 2007), where the important difference between substantive and procedural statutes was resolved. Estman was raised before the Superior Court, but was ignored. Clearly, under Estman the retroactive application of the ten year "look back" along with the possible increase of sentence would be a question of substantive due rights not procedural ones. Estman at 1195. Pennsylvania law definitively presumes against the retroactive effect of substantive statutes, Id. at 1193, particularly since the legislature is presumed to not intend an unconstitutional result, Id. at 1195. "Because [the statute in Estman] is substantive, it cannot be applied retroactively." Id. At 1196. Estman did not reach the *Ex Post Facto*

grounds as the due process violation was sufficient to overturn Estman's conviction.

As in that case, XIV Amendment due process requires that Pennsylvania must "play by its own rules' and protect Petitioner's right to elemental fairness.

CONCLUSION

The Commonwealth of Pennsylvania has denied Petitioner Shaub his constitutional rights as guaranteed by Art. I, § 10, Cl. 1 of the United States Constitution and the XIV Amendment thereunto. The petition for a writ of certiorari should be granted.

Respectfully submitted,

this 26th day of March, 2009

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APPENDIX 1

J.A13023/08

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
MATTHEW JOHN SHAUB,	:	
Appellant	:	No. 1749 MDA 2007

Appeal from the Judgement of Sentence Entered September 13, 2007, Court of Common Pleas, Lancaster County, Criminal Division, at No. CP-36-CR-0005656-2006.

BEFORE: LALLY-GREEN, SHOGAN, and COLVILLE*, JJ.

MEMORANDUM: FILED: July 16, 2008

Appellant, Matthew John Shaub, appeal from the judgment of sentence entered on September 13,

2007,[1] following his guilty plea to driving under the influence of alcohol ("DUI"). We affirm.

The trial court set forth the relevant facts and procedural history of this case as follows:

> Appellant was stopped on August 29, 2006, at approximately 10:05 p.m., by Officer Jared A. Hahn of the Lititz Borough Police Department for a traffic violation. Appellant, who emitted a strong odor of alcohol and presented with red blood shot eyes, and slurred speech, agreed to submit to standardized field sobriety testing. Based upon his performance, he was deemed to have failed and was subsequently placed under arrest. Appellant was then advised of the Pennsylvania Implied Consent DL-26 form which he acknowledged and agreed and agreed to provided a chemical test. Utilizing

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[1]Appellant purports to appeal from the order entered on September 20, 2007, denying his post-sentence motion, but a criminal appeal lies from the judgment of sentence imposed. *Commonwealth v. Clark*, 746 A.2d 1128, 1130 (Pa. Super. 2000) (*en banc*), *appeal denied*, 564 Pa. 702, 764 A.2d 1064 (2000). Hence, we have amended the caption.

*Retired Senior Judge assigned to the Superior Court.

the Intoximeter RBT IV, Appellant provided a chemical test of breath which yielded a blood-alcohol concentration of .210% at 10:47 p.m., approximately 40 minutes after the traffic stop.

On December 5, 2006, [Appellant] was charged with DUI (highest rate of alcohol), DUI (general impairment), and the summary offense of improper stop. Thereafter, on June 18, 2007, Appellant appeared with counsel before the Honorable William Henry to enter open guilty pleas to all charges. After conducting a thorough colloquy, Judge Henry accepted the pleas and ordered a presentence investigation report (PSI). The PSI revealed that Appellant had previously been arrested for a DUI on April 14, 1998. On August 25, 1998, he entered the accelerated rehabilitative disposition (ARD) program, which he completed successfully on March 27, 2000.

Because Appellant's blood-alcohol concentration at the time of his arrest was .210%, he was subject to 75 Pa.C.S.A. § 3804(c) for sentencing purposes. The Commonwealth's position at sentencing was that § 3804(c)(2) applied and Appellant must serve a minimum 90 days as a second offender because of the 1998 DUI. Appellant filed a sentencing memorandum of law in which he

argued that he was entitled to be sentenced as a first offender under § 3804(c)(1) because he completed the ARD program in 2000 and went an additional six years before being arrested for the instant offenses, thus surpassing the seven-year "look back" period of the former 75 Pa.C.S.A. § 3804(e). Effective February 1, 2004, there were various statutory changes to the DUI statute, the most relevant to this proceeding being the enlargement of the "look-back" period from seven to ten years for determining which prior offenses impact sentencing. Appellant was challenging the ten-year "look back" provision of the newly enacted § 3806 as an *ex post facto* application of the law.

At the sentencing hearing on September 13, 2007, [the trial court] considered the statute, Appellant's sentencing memorandum, and the presentence investigation report before imposing the mandatory sentence of 90 days to 23 months incarceration for a second-time DUI offender. Appellant was further ordered to pay fines and costs.

On September 19, 2007, Appellant filed a timely motion to reconsider sentence, which was denied by order of [the trial court] on September 20, 2007. Appellant

> contemporaneously filed a petition for bail while post-sentence motions were pending. This petition was also denied of September 20, 2007, as there were then no pending motions before the court.
>
> A notice of appeal was filed by Appellant's counsel on October 9, 2007.
>
> * * *
>
> Appellant had been directed to identify the matter complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On October 30, 2007, he filed a Rule 1925(b) statement identifying just one issue on appeal: whether the ten-year "look back" provision of § 3806(b) violates the constitutional and due process protections against *ex post facto* laws.

Trial Court Opinion, 11/1/07, at 1-4 (footnotes omitted).[2]

On appeal, Appellant raises two issues for our review:

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[2]We noted that Appellant's brief violates Pa.R.A.P. 2111(a)(9) and (b) in that it does not include a copy of the trial court's Pa.R.A.P. 1925(a) opinion.

A. Does 75 Pa.C.S. §3806(b) operate in an un-Constitutional manner when its 10 year lookback provision is applied to any person, especially Appellant Matthew J. Shaub, who has completed an ARD program under its predecessor statutes, who has kept the bargain of §3731(e), the 7 year lookback rule, and who has been caught in the deeper dragnet of §3806(b), so as to be exposed to a considerably longer prison sentence under §3804(c) upon a second conviction for DUI?

B. Is the sentence imposed in derogation of §21(2) which reads as follows:

> The repeal of 18 Pa.C.S. § 7514 and 75 Pa.C.S. § 3731 *shall not affect offenses committed prior to February 1, 2004*, or civil and administrative penalties imposed as a result of those offenses.

Appellant's Brief at 5 (emphasis original).

Appellant challenges the legality of his sentence in that he challenges the constitutionality of the cited statute as applied to his situation. *Commonwealth v. Tustin*, 88 A.2d 843, 845 (Pa.

Super. 2005). "The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary." *Commonwealth v. Williams*, 868 A.2d 529, 532 (Pa. Super 2005), *appeal denied*, 586 Pa. 726, 890 A.2d 1059 (2005).

Appellant first argues that application of the ten-year "look back" provision of section 3806(b) of the Vehicle Code to his completed 1998 ARD disposition was an *ex post facto* violation. According to Appellant, he "had a vested contractual substantive right to be treated as a 1st offender at his subsequent sentencing for DUI. The ten year lookback provision of 75 Pa.C.S.A. §3806(c) unilaterally stripped [him] of that right, in derogation of . . . the PA Constitution and the

Constitution of the United States."

Appellant's Brief at 7.

> When an appellant challenges the constitutionality of a statute, the appellant presents this Court with a question of law. Our consideration of questions of law is plenary. A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably, and plainly violates the constitution. Thus, the party challenging the constitutionality of a statute has a heavy burden of persuasion.

Commonwealth v. Howe, 842 A.2d 436, 441 (Pa. Super. 2004) (internal citations omitted).

Since the new DUI law became effective on February 1, 2004, this Court has repeatedly addressed the question of whether the ten-year "look back" period of section 3806 is constitutionally infirm. *See Tustin, supra* (holding that application of ten-year "look back" period to defendant's prior

DUI conviction did not violate his due process rights); *Commonwealth v. McCoy*, 895 A.2d 18 (Pa. Super. 2006) (*en banc*) (holding that enhancement of sentence on current DUI violation based on DUI conviction within ten-year "look back" period was not unconstitutional *ex post facto* application of DUI law); *Commonwealth v. Smith*, 904 A.2d 30 (Pa. Super. 2006) (rejecting claim of *ex post facto* violation where ten-year "look back" provision of Section 3806(b) applied to two prior convictions)[3].

Moreover, we have applied *Tustin*, *McCoy*, and *Smith* to the situation at hand, *i.e.*, enhancement of a current DUI sentence based on a concluded ARD within the ten-year "look back"

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[3]Most recently, we reiterated the rule of law set forth in *Tustin* and its progeny in *Commonwealth v. Cook*, 941 A.2d 7 (Pa. Super. 2007).

period of section 3806(b). See *Commonwealth v. Fulton*, 921 A.2d 1239 (Pa. Super. 2007), *appeal denied*, 594 Pa. 686, 934 A.2d 72 (2007) (concluding there was no error in imposition of DUI sentence enhanced by prior ARD pursuant to section 3806(b)); *Commonwealth v. Pleger*, 934 A.2d 715 (Pa. Super. 2007) (rejecting trial court's contract law analysis and reversing sentence not enhanced by ARD within ten-year "look back" period of section 3806(b)).

In light of this overwhelming authority, we conclude that no *ex post facto* violation occurred in the case at hand. The trial court properly treated Appellant's 1998 ARD as a prior offense pursuant to section 3806(b).

Next, Appellant claims the trial court sentenced him in derogation of the Act of Sept. 30,

2003, P.L. 120, No. 24, effective Feb. 1, 2004 ("Act 24"), which repealed the former DUI statute, 75 Pa.C.S.A. § 3731. "According to §21(2) and §21(5)(i)" of Act 24,[4] Appellant argues, the new law "can have

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[4]Section 21(2) provides as follows: "The repeal of . . . 75 Pa.C.S. § 3731 shall not affect offenses committed prior to February 1, 2004, or civil and administrative penalties imposed as a result of those offenses." Section 21(5) provides that:

> The following apply to offenses committed before February 1, 2004:
>
> > (i) Expect as set forth in subparagraph (ii) or (iii), this act shall not affect an offense committed before February 1, 2004, or any criminal, civil and administrative penalty assessed as a result of that offense.
> >
> > (ii) Subparagraph (i) does not apply if a provision added or amended by this act specified application to an offense committed before February 1, 2004, or to any criminal, civil or administrative penalty assessed as a result of that offense.
> >
> > (iii) Subparagraph (i) does not apply to the following provisions:
> >
> > > (A) The amendment of 42 Pa.C.S. § 7003(5) in section 3 of this act.

no effect on an ARD resolution under §3731; *i.e.*, it cannot take away from one who has entered and completed ARD the provisions which protect him from a 'second offense' prosecution if the 7 year element of §3731(e) was satisfied." Appellant's Brief at 10 (emphasis original).

Upon review, we conclude that Appellant misunderstands the non-retroactivity provisions of

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> (B) The amendment of 75 Pa.C.S. § 1516(c) and (d).
>
> (C) The amendment of 75 Pa.C.S. § 1534(b).
>
> (D) The amendment of 75 Pa.C.S. § 1547(d) in section 9.1 of this act.
> (E) The amendment of 75 Pa.C.S. § 3731(a)(4)(i) and (a.1)(1)(i) in section 13 of this act.

Id. at § 21(5) (footnote omitted).

Act 24. Pursuant to subsections 21(2) and (5), the new DUI law does not apply to offenses committed before February 1, 2004, unless otherwise provided. Appellant's 1998 ARD predates the effective date of Act 24. Moreover, non of the exceptions set forth in Section 21(5)(ii) or (iii) applies. Therefore, Appellant's 1998 DUI conviction was not subject to the penalties of the new DUI law. However, "our courts have held that a statute does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." *McCoy*, 895 A.2d at 34 (quoting *Alexander v. DOT, Bureau of Driver Licensing*, 583 Pa. 592, 604, 880 A.2d 552, 559 (2005)). Specifically, we have held that the new DUI statute "does not reach into the past and

increase punishment for concluded DUI convictions. The statute, rather, consider 'facts or conditions' which came into existence prior to its enactment, *i.e.* prior DUI convictions, and effects [sic] only the punishment for a new conviction under the newly enacted DUI law." *Id.* This Court explained in *Tustin* that "the enhanced punishment imposed for a later offense is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes, but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.'" *Tustin*, 888 A.2d at 846 (quoting *Witte v. United States*, 515 U.S. 389, 400 (1995)).

Applying the above principles to the case at hand, we conclude that, even though Appellant's

1998 ARD came into existence prior to enactment of the new DUI law, the trial court could consider if for purposes of applying the ten-year look back provision to his present conviction, which occurred more than two years after the repeal of section 3731. *McCoy*. In doing so, the trial court did not further punish Appellant for his 1998 ARD, but created an enhanced penalty for the present conviction, which was a repetitive offense. *Tustin*. Therefore, Appellant's second claim fails.

Judgment of sentence affirmed.

Judgement Entered:

/s/ James S. McCullough
Deputy Prothonotary

Date: July 16, 2008

APPENDIX 2

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	No. 5656 of 2006
	:	
	:CLERK OF COURTS	
v.	: 2007 NOV-1 PM 1:42	
	:LANCASTER COUNTY,	
MATTHEW J. SHAUB	:PA	

OPINION SUR PA R.A.P. 1925(a)

BY: ASHWORTH, J., NOVEMBER 1, 2007

Matthew J. Shaub has filed a direct appeal from the judgment of sentence following his guilty plea to driving under the influence of alcohol (DUI). This opinion is filed pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

I. Background

The relevant facts and procedural history are as follows. Appellant was stopped on August 29, 2006, at approximately 10:05 p.m., by Officer Jared A. Hahn of the Lititz Borough Police Department for

a traffic violation. Appellant, who emitted a strong odor of alcohol and presented with red blood shot eyes, and slurred speech, agreed to submit a standardized field sobriety testing. Based upon his performance, he was deemed to have failed and was subsequently placed under arrest. Appellant was then advised of the Pennsylvania Implied Consent DL-26 form which he acknowledged and agreed to provide a chemical test. Utilizing the Intoximeter RBT IV, Appellant provided a chemical test of breath which yielded a blood-alcohol concentration of .210% at 10:47 p.m., approximately 40 minutes after the traffic stop.

On December 5, 2006, Shaub was charged with DUI (highest rate of alcohol),[1] DUI (general

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[1] 75 Pa. C.S.A. § 3802(c).

impairment),[2] and the summary offense of improper stop.[3] Thereafter, on June 18, 2007, Appellant appeared with counsel before the Honorable William Henry[4] to enter open guilty pleas to all charges. After conducting a thorough colloquy, Judge Henry accepted the pleas and ordered a presentence investigation report (PSI). The PSI revealed that Appellant had previously been arrested for a DUI on April 14, 1998. On August 25, 1998, he entered the accelerated rehabilitative disposition (ARD) program, which he completed successfully on March 27, 2000.

Because Appellant's blood-alcohol

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[2]75 Pa. C.S.A. § 3802(a)(1).

[3]75 Pa. C.S.A. § 3351(a).

[4]Judge Henry is a visiting senior judge from Jefferson County.

concentration at the time of his arrest was .210%, he was subject to 75 Pa. C.S.A. § 3804(c)[5] for sentencing purposes. The Commonwealth's position at sentencing was that § 3804(c)(2) applied and

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[5]Section 3804(c) provides in pertinent part:

(c) Incapacity; highest blood alcohol; controlled substances.- An individual who violates section 3802(a)(1) and refused testing of blood or breath or an individual who violates section 3802(c) or (d) shall be sentenced as follows:

(1) For a first offense, to:

(i) undergo imprisonment of not less than 72 consecutive hours;
(ii) pay a fine of not less than $1,000 nor more than $5,000;
(iii) attend an alcohol highway safety school approved by the department;
and
(iv) comply with all drug and alcohol treatment requirements imposed under section 3814 and 3815.

(2) For a second offense, to:

(i) undergo imprisonment of not less than 90 days;
(ii) pay a fine of not less than $1,500;
(iii) attend an alcohol highway safety school approved by the department;
and
(iv) comply with all drug and alcohol treatment requirements imposed under section 3814 and 3815.

75 Pa. C.S.A §3804(c).

Appellant must serve a minimum of 90 days as a second offender because of the 1998 DUI. Appellant filed a sentencing memorandum of law in which he argued that he was entitled to be sentenced as a first offender under § 3804(c)(1) because he completed the ARD program in 2000 and went an additional six years before being arrested for the instant offenses, thus surpassing the seven-year "look back" period of the former 75 Pa. C.S.A. § 3731(e). Effective February 1, 2004, there were various statutory changes to the DUI statute, the most relevant to this proceeding being the enlargement of the "look-back" period from seven to ten years for determining which prior offenses impact sentencing. Appellant was challenging the ten-year "look back" provision for the

newly enacted § 3806[6] as an *ex post facto* application of the law.

At the sentencing hearing on September 13, 2007, I considered the statute, Appellant's sentencing memorandum, and the presentence investigation report before imposing the mandatory sentence of 90 days to 23 months incarceration for a second-time DUI offender. Appellant was further

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[6]Section 3806 provides in relevant part:
(b) Repeat offenses with ten years.--The calculation of prior offenses for purposes of section 1553(d.2) (relating to occupational limited license), 3803 (relating to grading) and 3804 (relating to penalties) shall include any conviction, adjudication of delinquency, juvenile consent decree, acceptance of Accelerated Rehabilitative Disposition or other form of preliminary disposition within the ten years before the present violation occurred for any of the following:
(1) an offense under section 3802;
(2) an offense under former section 3731;
(3) an offense substantially similar to an offense under paragraph (1) or (2) in another jurisdiction; or
(4) any combination of the offenses set forth in paragraph (1), (2) or (3).
75 Pa. C.S.A. §3806(b).

ordered to pay fines and costs.

On September 19, 2007, Appellant filed a timely motion to reconsider sentence, which was denied by order of this Court on September 20, 2007. Appellant contemporaneously field a petition for bail while post-sentence motions were pending. This petition was also denied on September 20, 2007, as there were then no pending motions before the court.

A notice of appeal was filed by Appellant's counsel on October 9, 2007. On October 15, 2007, Appellant filed with the Superior Court of Pennsylvania an "emergency petition for bail during appeal and supersedeas." By per curiam order entered on October 18, 2007, the Superior Court remanded the matter to this court, for a period not to exceed 20 days, during which time the trial court was directed to state on the record its reasons for

denying bail pursuant to Pa. R.Crim.P. 521(B)(1). A bail hearing was subsequently held on October 25, 2007, at which time Appellant's request for bail was granted and he was released on ROR bail pending his appeal.

In the interim, Appellant had been directed to identify the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On October 30, 2007, he filed a Rule 1925(b) statement identifying just one issue on appeal: whether the ten-year "look back" provision of § 3806(b) violates the constitutional and due process protections against *ex post facto* laws.

II. Discussion

Appellant contends that 75 Pa. C.S.A. § 3806(b) amounts to an *ex post facto* application of the DUI statute, contrary to the provisions of the

United States and Pennsylvania Constitutions. (See Statement of Matters ¶ 4.) Specifically, Appellant argues that

> § 3806(b) operates in an un-Constitutional manner when its 10 year lookback provision is applied to any person, especially Shaub, who has completed an ARD program under its predecessor statutes, who has kept the bargain of § 3731(e), the 7 year lookback rule, and who has been caught in the deeper dragnet of § 3806(b), so as to be exposed to a considerably longer prison sentence under § 3804(c). This amounts to a substantive violation of Shaub's due process right of freedom and an *ex post facto* application of law, where it is not precisely enunciated by the legislature to be so intended.

(Id. at ¶ 6.)

The Superior Court definitively addressed this issue in 2006. In Commonwealth v. McCoy, 895 A.2d 18 (Pa. Super. 2006), the Court concluded that there is no *ex post facto* violation in the application of the ten-year "look back" provision of § 3806(b) for several reasons.

> First, there is a presumption that '[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly. 1 Pa. C.S.A. §1926. Here, the General Assembly did not 'clearly and manifestly' intend the DUI law to be retroactive. For instance, the ten year 'look back' would not apply to DUI convictions which occurred before February 1, 2004. In any event, this principle 'becomes pertinent only after it has been determined that a proposed operation of a statute would indeed be retrospective. In this regard, our courts have held that *a statue does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.*' . . .
> The statute does not reach into the past and increase punishment *for concluded DUI convictions*. The statute, rather, considers 'facts or conditions' which came into existence prior to its enactment, i.e. prior DUI convictions, and effects only the punishment for a new conviction under the newly enacted DUI law.

Id. at 34-35 (citation omitted). See also Commonwealth v. Smith, 904 A.2d 30, 39-40 (Pa. Super. 2006). This conclusion was most recently

affirmed by the October 9, 2007, Superior Court opinion in Commonwealth v. Pleger, ··· A.2d ····, 2007 WL 2917392 (Pa. Super. 2007).

As the Court noted in McCoy: "The fact is, appellant is a DUI recidivist. He may not like that the new statute now looks back ten years making is 1995 DUI a prior offense, thereby enhancing his punishment for his new DUI offense, but that is whether the legislature intended. There is no *ex post facto* violation." 895 A.2d at 34. Similarly, Appellant is a DUI recidivist. His first offense was in 1998. His second offense was in August 2006, fully two and one-half years after the effective date of the statutory amendments to the DUI law. Accordingly, Appellant had notice of the new law before his new offense and could gauge his future conduct. The court's application of the ten-year "look

back" provision in § 3806(b) did not affect in any way the punishment for the concluded DUI conviction from 1998. It simply created an enhanced penalty for Appellant's 2006 offense. This court was bound by law to give Appellant a mandatory sentence of 90 days as a second DUI offender.

III. Conclusion

For the reasons set forth above, it is respectfully suggested that the judgment of sentence of Matthew J. Shaub be affirmed.

Accordingly, I enter the following:

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	No. 5656 of 2006
v.	:	
MATTHEW J. SHAUB	:	

ORDER

AND NOW, this 1st day of November, 2007, the Court hereby submits this Opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

BY THE COURT:

/s/ David L. Ashworth
DAVID L. ASHWORTH
JUDGE

Copies to: Christine L. Wilson, Esquire
James A. Nettleton, Esquire

SUPPLEMENTAL APPENDIX

963 A.2d 469; 2008 Pa. LEXIS 2335, *

COMMONWEALTH OF PENNSYLVANIA, Respondent v. MATTHEW JOHN SHAUB, Petitioner

No. 535 MAL 2008

SUPREME COURT OF PENNSYLVANIA

963 A.2d 469; 2008 Pa. LEXIS 2335

December 30, 2008, Decided

NOTICE:

DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]

Petition for Allowance of Appeal from the Order of the Superior Court.
Commonwealth v. Shaub, 959 A.2d 973, 2008 Pa. Super. LEXIS 3402 (Pa. Super. Ct., 2008)

OPINION

ORDER

PER CURIAM

AND NOW, this 30th day of December 2008, the Petition for Allowance of Appeal is DENIED.